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STRIKES AND COURTS OF EQUITY.

Since the first appearance in this country of the injunction as a means of restraining the acts of employes on strike,[1] many articles have appeared for and against this development of the equitable powers of the court.[2] By the decision in the

[1] The earliest case is perhaps that of New York, Lake Erie and Western Ry. Co. *v.* Wagner, 17 Wk. Law Bul. (Ohio), 506 (1887). The first three cases of importance were Sherry *v.* Perkins, 147 Mass. 212 (1888); Casey *v.* Cincinnati Typographical Union, No. 3, 45 Fed. 135 (1891), and the Cœur d'Alene Consolidation and Mining Co. *v.* Miners' Union of Wardner, 51 Fed. 260 (1892).

[2] In the LAW REGISTER two articles have appeared defending the position taken by the courts, "The Legal Side of the Strike Question," by Ardemus Stewart, 33 Am. Law Reg. (N. S.) 609 (1894), and an address by Hon. William H. Taft on "Recent Criticism of the Federal Judiciary," 34 Am. Law Reg. (N. S.) 576, pp. 605-610 (1895). The late Mr. Richard C. McMurtrie attacked the position of the Supreme Court of the United States in Edenbrecker *v.* Plymouth County, 134 U. S. (1890) 31, "Equity Jurisdiction Applied to Crimes and Misdemeanors," 31 Am. Law Reg. (N. S.) p. 1 (1892), while the present writer has expressed some reasons against the exercise of the power claimed by the courts in a series of articles: "Injunctions to Restrain Libels and Courts of Criminal Equity," 31 Ib, 782 (1892); "The Courts and Striking Railroad Employes—The

Debs Case, however, the question was closed as far as the Federal Courts are concerned. Indeed, we might almost say, that there is not a state court where the right to issue an injunction restraining an act, though the act was at the same time a crime, could be successfully questioned. So settled has become the practice of issuing these injunctions that even the labor unions themselves have ceased to contest their legality in the courts. In the case of *Vegelaher* v. *Gunter*,[1] in Massachusetts, the counsel for the strikers did not object to an injunction restraining them from violence and intimidation, but to the court's so wording the injunction that they could not keep two strikers at the door of the complainants' mill to state their side of the case to the complainants' employes, as the employes went to or came from work.

The courts still say that these injunctions are not criminal proceedings, yet the language of the opinions indicates very clearly their essentially criminal nature. Thus since, *In re Debs*, in the case of *Mackall* v. *Ratchford*,[2] striking miners were convicted by the Federal Court of contempt of an injunction restraining them from "in anywise interfering with the management, operation, and conduct of the complainants' mines, by menace, threats or intimidation." "If," says Judge Goff, "the defendants prevented the employes of the mine from going to or from their work, by interfering with them, . . . they are guilty of the contempt charged, and should, must be, and will be punished." And again . "Was that influence to be exerted, and was it exerted in a lawful and proper manner? The answer to that question determines the guilt

Ann Arbor Cases," 32 Ib. 481 (1893); "A Protest Against Administering Criminal Law by Injunction—The Debs Case," 33 Ib. 887 (1894); "Injunctions to Keep Men at Work," 33 Ib. 81 (1894). Two articles are published in the reports of the American Bar Association, one by W. M. Rose, "The Law of Trusts and Strikes," which only refers to the subject (vol. xvi, p. 287 (1893)), the other by Charles C. Allen, "Injunctions and Organized Labor," which is strongly opposed to the jurisdiction, (vol. xvii, p. 299 (1894)), republished in the American Law Review, (vol. xxviii,) 828. See, also, a note "On Government by Injunction" in 29 American Law Review, 282 (1885).

[1] 44 N. E. 1077 (1896).

[2] 82 Fed. 41 (1897).

or innocence of the accused." Another thought which also runs through this case, as through most of the injunction cases, is the same as that which influenced the decision in the Debs Case: "Why should not a court of equity aid the executive?" The illustration is used of a parade blocking a business thoroughfare. " . . . if such parades were not prevented by the city authorities, the owners of property so affected would be entitled to the aid of the courts in protecting their rights."

The so-called "injunction law" has entered on a second stage of its development. The first cases primarily deal with the question whether courts of equity will interfere to prevent certain threatened harms to property, though the acts contemplated may amount to a crime. This having been decided in the affirmative, the courts now discuss what acts resulting in harm they will restrain. For it must be admitted that it is not the policy of the law to prevent one man from doing all acts which may harm his neighbor. By advertising that I have the best china for the lowest prices I may ruin my neighbor, but this ruin is regarded with indifference by the law. Public policy, in this case, regards the benefits to be derived from free competition, or rather, free struggle for life, as greater than the evil of my neighbor's harm. The law must draw the line between that harm which a man may, and that which he may not do.[1] In the struggle between organized labor and organized capital, this line is only partly marked out. It is evidently going to be the mission of these injunction proceedings to mark it more plainly. Indeed, as we indicated, they have even now begun the work, with what wisdom it remains for time to show.

It is, of course, without question, that no one has a right to injure the property of another by violence, or to attack his laborers, or to threaten to do these things.[2] Thus in Missouri, a body of strikers cannot loiter near their former place of em-

[1] See, for a further exposition of this point, Judge Holmes' opinion in Vegelaher *v.* Gunter, *supra*.

[2] Davis *v.* Zimmerman, 36 N. Y. Suppl. 303 (1895). Such acts subject the actor to a criminal indictment: R. *v.* Rowlands, 5 Cox C. C. 436 (1851).

ployment, because this tends to put the workers in bodily fear.[1]

For the same reason, the Federal Courts prevented the marching and countermarching of strikers on the public road leading to a mine.[2]

The question of picketing has given more trouble, but the drift of authority is that it is an illegal method of inflicting harm on employers. The reason for the opinion seems to be the same as in the case of "marching," it tends to create unlawful intimidation.[3] Displaying banners in which all persons are warned to keep away from a certain shop has been held to overstep the mark of legitimate harm, though here too, the court considered the banners part of an organized scheme of intimidation.[4] The boycott has also been considered an illegal weapon.[5] One of the express grounds for these boycott de-

[1] Shoe Company *v.* Laxy, 131 Mo. 212 (1895).

[2] Mackall *v.* Ratchford, 82 Fed. 41 (1897).

[3] Vegelaher *v.* Gunter, 44 N. E. 1077 (1896). They have no right at least to use insulting language: Murdock *v.* Walker, 152 Pa. 595 (1893). If accompanied by threats, the picketing is criminal: R. *v.* Druitt, 10 Cox C. C. 592 (1867). See Lyons *v.* Wilkins [1896], 1 Ch. 811, for latest English case; also mentioned *infra*.

[4] Sherry *v.* Perkins, 147 Mass. 212 (1888).

[5] Oxby *v.* Coopers' International Union, 72 Fed. 695 (1896); Casey *v.* Typographical Union, 45 Fed. 135 (1891). A boycott was held a criminal conspiracy in State *v.* Glidden, 55 Conn. 46 (1886); State *v.* Stewart, 39 Vt. 273 (1887); Callan *v.* Wilson, 127 U. S. 540 (1888); People *v.* Wilzig, 4 N. Y. Crim. Rep. 403 (1886); People *v.* Kostka, 4 N. Y. Crim. Rep. 429 (1886); Baughman *v.* Askew, 11 Va. L. J. 196 (1887); Com. *v.* Shelton, 11 Va. L. J. 324 (1887); Cramp *v.* Com., 84 Va. 927 (1888). But see, *contra*, the decision of Shaw, C. J., in Com. *v.* Hunt, 4 Metc. 111 (Mass. 1842), pp. 129, 130. This opinion of the first American magistrate should be read. Whether we agree with it or not, it is an opinion marked by great ability.

In Old Dominion Steamship Company *v.* McKenna, 30 Fed. 48 (1887), the Circuit Court for the Southern District of New York held a boycott to be a civil wrong for which damages could be recovered. Indeed, in this case the court went much farther, and held the members of the union liable in that they procured the plaintiff's workmen to quit work in a body. In State *v.* Donaldson, 32 N. J. L. 151 (1867), a combination to produce a strike was held an indictable conspiracy. A boycott on interstate freight by the employes of a railroad company is, of course, illegal, but this is on the ground that their master, the common carrier, is obliged to handle such freight: Toledo, etc., R. R. Co. *v.* Pennsylvania Co., 54 Fed. 730 (1893).

cisions is that a combination to do an act may be unlawful, though the act done by the individual is lawful, because, unless the act is done by many in combination, it will not be hurtful. Judge Harlan, in *Arthur* v. *Oakes*,[1] has expressed this idea when he says, "A combination of two or more persons, with such intent (the intent to cripple a road), and under such circumstances that give them, when so combined, a power to do an injury they would not possess as individuals, acting singly, has always been recognized as in itself wrongful and illegal."[2]

The strike itself, or the combination of all of a man's employes to quit work in a body, in order to compel acquiescence in their demands, was declared illegal by Judge Jenkins, in the case of *Farmers' Loan and Trust Company* v. *Northern Pacific Railway Company*.[3] The case was reversed,[4] but one can hardly say that the question is settled. It is worth noting that Chief Justice Shaw thought a strike on the part of those engaged for a definite period of employment illegal,[5] though he would have been very much surprised to be asked to issue an injunction restraining such a strike. It is admitted that

[1] 11 C. C. A. 209; 62 Fed. 321 (1894).

[2] Two cases are cited by Judge Harlan to support his proposition: Callan *v.* Wilson, 127 U. S. 540 (1887), and Com. *v.* Hunt, 4 Metc. 111 (Mass. 1842). The first case is one arising out of a boycott of a musician by a musical labor union. The conviction was had in the police court of the District of Columbia without a trial by jury, and the Supreme Court set aside the verdict as in conflict with that provision of the Constitution of the United States providing for trial by jury. The second case is the one in which Chief Justice Shaw decided that a boycott was not necessarily criminal. The case was probably cited by Chief Justice Harlan for the expression, page 131: "If a large number of men engaged for a certain time should combine together to violate their contract, and quit their employment together, it would present a very different question."

[3] 60 Fed. 803 (1894.) See, also, a strike considered as a criminal conspiracy: State *v.* Donaldson, 32 N. J. L. 151 (1867).

[4] Arthur *v.* Oakes, 63 Fed. 310 (1894); but see Old Dominion Steamship Co. *v.* McKenna, 30 Fed. 48 (1887). Elder *v.* Whitesides, 72 Fed. 724 (1896), is probably an authority *contra* to Arthur *v.* Oakes; but it is so reported that the facts on which the injunction was issued are not clear. See, however, Burdell *v.* Hogan, 54 Fed. 40 (1893).

[5] Commonwealth *v.* Hunt, 4 Metc. (Mass.) 111 (1842).

one cannot remain an employe and combine to refuse to work.[1]

Because the writer is opposed to the use of the injunction, in many, if not all of the above instances, it by no means follows that he is opposed to the substantive rules of law expressed in them. In the struggle between the class that has labor to sell, and the class that has property with which to buy labor, there are to the contestants things which the law should allow, and things which it should not allow. It is proper that a line should be drawn, and infinitely better that it should be drawn by the courts in their attempt to do right in each individual case, than that the law should grow up by direct legislative enactment. The objection is not to the substantive law, but to the machinery and tribunal that enforces it.

Even here, however, it is proper to draw a distinction. Many acts expose a man to civil liability which do not lay him open to a criminal prosecution. It may well be, though it is not a necessary inference, that in this struggle between capital and labor, there are acts which should expose the actor to a civil,

[1] Toledo A. A. & N. Ry. Co. *v.* Penn. Co., 54 Fed. 730 (1883), Ib. 746 (1893); Southern California Ry. Co. *v.* Rutherford, 62 Fed. 796 (1894).

We have not discussed the English cases in the text. The first English case, where an injunction was granted against strikers, is that of Spinning Company *v.* Riley, L. R. 6 Eq. 551 (1868), in which the strikers were restrained from printing or publishing any placards or advertisements stating that all "well wishers" to the Operative Cotton Spinning Association should not cause any trouble or annoyance to the Spring Head Spinning Company by knocking at the door of their office until the dispute between them and the self-acting minders was finally terminated. See, also, Dixon *v.* Holden, L. R. 7 Eq. 488 (1869), and Rollins *v.* Hinks, L. R. 13 Eq. 355 (1871). These cases were overruled in Assurance Company *v.* Knott, 10 Ch. App. 142 (1874). See, also, Temperton *v.* Russell, 1 Q. B. 435, 438 (1893). Under a section of the present Judiciary Act, 36 and 37 Vict., ch. 66, sec. 25 and sub-section 8, the English courts have the right to issue injunctions against one threatening a trespass without claim of legal right. The courts have interpreted this Act as giving them power to restrain one man from persuading another to break his contract with a third person, when the object of such persuasion is the malicious injury to the third person: Mogul *v.* McGregor, A. C. 25 (1892); Temperton *v.* Russell, 1 Q. B. 715 (1893); Lyons *v.* Wilkins, 1 Chanc. 811; but see the remarks of Lord Escher in Flood *v.* Jackson, 2 Q. B. 38 (1895), where he said that the only recognized tribunal that could decide whether the act is or is not malicious is a jury.

but not a criminal, liability.[1] Thus, the strike itself may possibly be considered a civil tort, but not a criminal conspiracy. In such cases, the objection usually urged against the injunction would not hold. The protest is against the use of the injunction where the act restrained is unquestionably a crime, viz., the injunction which restrains violence, or threats of violence to person or property. While objecting to the injunction in such cases, we admit that it is settled law, that the injunction may issue.

The fact that the law on this point is settled, as far as the courts are concerned, cuts off one class of argument, which heretofore has been urged against the use of the injunction, namely, that it is contrary to settled principles of equity jurisdiction. The battle must now be fought out at the polls and before legislatures. In such forum it is not a good reason for changing what the judiciary, after deliberation, have decided, to say that they have made a new departure. We must go further, and show that the new departure is contrary to public policy. It is also incumbent on the advocates of the injunction to do something more than show a line of ancient legal precedents to support the new development. The argument that equity will always protect property is as futile as the argument on the other side that heretofore the limit of equitable jurisdiction has been the restraint of nuisances. When the right rule for courts to follow becomes a political and legislative question, the only arguments worth considering are those which deal with principles of public expediency. The court, in *Davis* v. *Zimmerman*,[2] indicated the real ground on which the use of the injunction must now be supported when it said, "It is better for employers and employes, and for the peace and safety of the state, that such relief be exercised by the courts, where parties can be heard, than to permit such violations of the law to go unrestrained, until force is arrayed against force, and the strong arm of the executive is compelled

[1] If the reader will look over the foregoing notes, however, he will see that in every case where an injunction has been issued the criminal courts had previously upheld indictments for similar acts.

[2] 36 N. Y. Suppl. 303 (1895).

to intervene with troops to prevent disorder and destruction of property."

It is not my object to point out all the reasons why we should not employ the injunction to restrain an act which is a crime. As the question presents itself there would seem to be no need. The issuing of the injunction in such a case, coupled with the fact that violations may be tried by a court without a jury, is in direct conflict with a principle, or public policy, vital to the well being of any people. This principle is that no citizen shall be accused of criminal acts, or have the fact of his having committed a criminal act determined, by anyone connected with, or selected by, the government. The words "criminal act," as here used, do not, I think, mean every act which subjects a man to an action by the state. There may be acts which the law calls criminal, but which do not hold the actor up to the odium of his fellows. It is true that prosecutions for such acts must be tried by jury under our present law, but a modification of our law in this respect would not lay us open to the charge of having lost part of our heritage of liberty. So the jury system, as we know it, might be radically altered, a majority vote might decide in criminal cases, one jury might try all the cases occurring for a much longer time than at present, the grand jury might try as well as accuse, the number of jurymen might be greatly increased or diminished, and yet the fundamental principle above set forth remain unshaken. There is no peculiar sacredness in our present jury system, but the principle on which it rests is one of the master keys to human freedom.

The reasons for our rule of public policy are plain, and have appealed to us for many generations as sound. It is no light thing for a private individual to accuse a man of crime, but when one in an official position makes the accusation, it carries in the minds of his neighbors half the weight of formal conviction. You ought not to accuse a man of imagining evil. That was the trouble with the old law of treason. The overt act alone is what is regarded in all systems of enlightened jurisprudence. Now the mere issuing of the injunction is such an accusation. When a judge says in a written order: "You

must refrain from destroying the property of A. B., or from beating his servants," the judge asserts his belief that you are about to do these things.

Again, under all civilized systems of law, the judge and the the executive officer are different persons. Why? There are three reasons.

First: Because the man who makes the executive order should not be the one to weigh the question of his right to issue it. He cannot do so impartially.

Second: Because no one can properly try another who is ac-accused of breaking his own personal order. When you are are accused before a jury of destroying A. B.'s property, you are tried for violating a well recognized law of society, not for violating the personal order of the men who try you. Judges are but human. Have you committed a crime? This is an abstract question. But it is different when a personal order of the judge has been treated with contempt. In one contempt case the judge complains: "A striking miner said, 'I will eat mine (the injunction) for breakfast.'" Such expressions as these concerning one's orders are not calculated to put one in a proper frame of mind to try the fact as to whether a particular person has violated the order.[1] Indeed, if there is any doubt of the truth of the proposition that a man should not try violations of his own orders, reading the contempt cases would expel that doubt. No one can read these cases without realizing that the judge is upholding not what he believes to be the law, but his own personal order.

Third: The community must believe the judiciary are impartial. This implicit trust, and the consequent position of the judiciary which enables them to compel obedience without

[1] Mackall *v.* Ratchford, 82 Fed. 41, p. 44. I do not want to be understood as saying that Judge Goff was unfair in this case. There seems to have been no question that the accused had violated the injunction. I simply wish to indicate that it is evident that the learned judge, through no fault of his, unless he was at fault in being human, was in no judicial frame of mind to enable him to try the fact whether the persons before him had or had not violated his order: Lake Erie & W. Ry. Co. *v.* Baily, 61 Fed. 494 (1893); Lacos *v.* Toledo P. & W. R. R., 7 Biss. U. S. C. C. 513 (1887); King *v.* Ohio & Miss. R. R. Co., 7 Biss. 529 (1887); United States *v.* Kane, 23 Fed. 748 (1885).

force, is one of the tests of advanced civilization, as it is the best guarantee for civil order. Such a trust is impossible, and, we believe, properly impossible, where the judge tries not violations of law, but violations of his personal order.

The reply which is made to this line of argument by those who, like Mr. Justice Brewer in the Debs case,[1] have so far used any argument other than the technical one that equity will protect property, is that the injunction proceedings accomplish the object for which they are issued; that violence is stopped; that the strike is put to an end too. He points to the testimony of one of the strikers in that case: "It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike." And this may be admitted. But at what cost? At a cost of a part of that respect for the court which is the rich product of our civilization, and which is the very force which makes these injunctions a success at the present time. One cannot come in contact with the class adversely affected by these orders without at once perceiving that we are rapidly undermining one of the props of that social order which is necessary for the continuation of any civilization.

The argument which we quoted from the New York case, however, contains a valuable suggestion. It is there pointed out that the injunction warns the contestants in a capital and labor struggle when they are about to go too far, and that this warning prevents violation of the law. In many cases this is so, and if legislation should ever, as we hope it will, abolish the injunction as at present used, an effort should be made to retain this feature.

There is no use warning a man not to do personal violence to another, or not to shake his fist in another's face. He knows these acts are illegal. When a reminder is necessary it can be given by the executive. But it is found that there are many acts which strikers often think they have a right to do, and which they would not believe any one but a judge that they have not a right to do, but which acts produce fear of

[1] 158 U. S. 564 (1895).

bodily harm in the minds of their antagonists and are illegal. The case of *Mackall* v. *Ratchford*[1] is a good illustration of this. The strikers honestly thought they had a right to march and counter-march on a public road in front of the mines. They did not intend violence, and there was no violence. But their marching put the non-striking miners in fear of bodily harm. It was something which the strikers had no right to do, and which their persistence in after the warning might well be considered a crime. In such cases, and they are numerous, the injunction, which is not really an injunction but a warning, has great uses. An alleged violation, however, should be tried by a jury before a judge other than the one issuing the order.

On the other hand, I cannot agree that it would remedy the present evil to say simply that all violations of injunctions should be tried by a jury. In the first place, where the act enjoined is unquestionably a crime, recognized as such by all the community, the grand jury and not a judge is the proper body to make the accusation. In the second place, the old contempt cases are not fitted for jury proceedings. These are the cases where the defendant by doing what he does under a claim of right in property, as cutting down trees because he claims to own the land, has done something which puts his legal title to a test. The plaintiff has brought him into court. The defendant has offered legal battle, and by so doing rendered himself with respect to the property in dispute, subject in a peculiar way to the court's orders. The court ought to have a summary jurisdiction to enforce these orders.

We have said that we hope legislation will wipe out the contempt cases in criminal matters. At the same time we cannot but recognize that this phase of the extension of judicial power is but one of the many in which the judge evinces his unconscious belief that the work of the other department of government must be done by him, as well as the work of judging. The reason for this attitude is not far to seek. It lies in the dry rot which has attacked our state executives and our state

[1] 82 Fed. 41 (1897).

legislatures, which renders them unable to perform in anything like an efficient manner their proper functions.

William Draper Lewis.

NOTE.—Since the above was in type, the January number of the *Virginia Law Register* has come to hand, containing an article by Mr. S. S. P. Patteson on "Government by Injunction." From this article I see (I quote from Mr. Patteson) that "in the State of Kansas a statute has already been passed entitled 'An Act to establish trial by jury in cases of contempt of court and restricting the power of judges and courts in contempt proceedings.' Section 5 of the Kansas Law, which went into effect May 8, 1897, is as follows: 'The testimony taken on the trial of any accusation for contempt shall be preserved, and any judgment of conviction therefor may be reviewed upon direct appeal to, or by writ of error from the Supreme Court, and affirmed, reviewed, or modified as justice may require. Upon allowance of an appeal or writ of error, execution of the judgment shall be stayed upon the giving of such bond as may be required by the court or judge thereof, or by any justice of the Supreme Court.' (18th Session Laws of Kansas, 1897, p. 205.)

"By it the offence is divided into two classes: contempts committed in the presence of the court, and contempts not committed in the presence of the court. The law as to the former is left untouched, but as to the latter the power of the court is so hampered as to be almost destroyed. Summary punishment or restraint of liberty upon *ex parte* affidavits is abolished. The officer must return the process and show that it has been disobeyed; then an attachment may issue and the person be arrested and brought before the court. When this is done a written accusation must be filed, in the nature of an indictment, which the accused is required to answer at a time and place fixed by the order of the court; and, if the accused answers, the trial proceeds, as in criminal cases, where the accused is confronted by the witness in the presence of a jury. He has also a right of appeal. The right of appeal destroys the jurisdiction of the court in that state, because it takes away from it the power to use force *at the time* it may be necessary to put down a mob or strike by that means."